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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MORGAN GUARANTY TRUST COMPANY OF NEW YORK
a New York corporation
Plaintiff and Appellant,

vs.

AMERICAN SAVINGS AND LOAN ASSOCIATION,
a California corporation,
Defendant and Appellee.

AMERICAN SAVINGS AND LOAN ASSOCIATION,
a California corporation,
Third Party Plaintiff,

vs.

CHASE MANHATTAN BANK, N.A.,
Third Party Defendant.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the decision below correctly apply New York common and statutory law in holding that a bank may recover a mistaken payment made to the presenter of a note where the recipient knew it was not entitled to be paid by reason of the maker's bankruptcy?

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties.

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STATUTES INVOLVED

The decision below considered several provisions of the New York Uniform Commercial Code: sections 1-103, 3-108, 3-410, 3-417, 3-418, 3-501, 3-502, 3-511, 4-104, 4-105, 4-108, 4-202, 4-212, 4-301 and 4-302. Principal among these is section 1-103, which provides:

> "Unless displaced by the particular provisions of this Act, the principles of law and equity, including

the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions."

COUNTER STATEMENT OF THE CASE

Petitioner American Savings & Loan Association's statement omits pertinent facts and requires a brief additional recitation.

Respondent Morgan Guaranty Trust Company of New York commenced this action seeking restitution of the mistaken payment by Morgan of two $5 million bearer notes issued by Manville Corporation made payable at Morgan. American purchased the notes in July, 1982. Subsequent to the purchase but prior to the maturity of the notes on September 2, 1982, the maker Manville Corporation filed for protection under the United States bankruptcy laws, thus stripping American and all other Manville creditors of their rights to receive payment on Manville obligations at their maturity.

After Manville's Chapter 11 filing American knew it was not entitled to receive payment on the notes. For example, on September 1, 1982, a Senior Vice-President of American specifically instructed the American employee assigned to request daily wire transfers of funds due American from Chase Manhattan Bank ("Chase"), which held the notes as custodian for American, to delete from her regular request the $10 million attributable to the Manville notes. (C.R. 37, pp. 102-105.)[1] However, Chase submitted the notes to Morgan at maturity and Morgan mistakenly "paid" the items by failing to return

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[1] "C.R." refers to the Clerk's Record compiled on appeal to the Court of Appeals.

them prior to the time specified in the New York Clearing House rules. (Pet. App. A-4-5.)

As a consequence of Morgan's failure to meet the Clearing House deadline on September 2, 1982, Chase's Clearing House account was credited with the $10 million, representing payment on the Manville notes, and Chase in turn credited American's account at Chase in the early morning of September 3. (Pet. App. A-5; C.R. 40, p. 65; C.R. 59, p. 5.)

When processing American's September 3 routine request for wire transfer of funds, Chase employees realized that American had requested exactly $10 million less than what was credited to its account and available for transfer. At approximately 11:00 a.m. on September 3, Chase communicated this fact to the American Senior Vice President who had the day before given the instruction to delete the $10 million from American's request for funds. That individual thereupon instructed Chase to wire the extra $10 million to an American account in California. (C.R. 40, pp. 65-67.)

Within one hour after this transfer of $10 million, Morgan discovered its mistake, so notified Chase and demanded a return of the funds. Chase responded that the money had already been transferred but declined to disclose the recipient. Chase thereafter notified American of Morgan's demand, and requested permission to debit American's account at Chase for $10 million so that the monies could be returned to Morgan. American refused to give such authority, and further instructed Chase not to reveal its identity to Morgan. (C.R. 37, p. 161; C.R. 40, pp. 69-72.)

In the ensuing weeks, American and Chase concealed American's identity as recipient of the funds. American's final communication with Morgan prior to the commence-

ment of suit is characteristic of its attempts to "stonewall" Morgan and to delay or divert its recovery efforts:

> "We are advised . . . that [American] has had no transactions with you concerning the notes which you describe . . . and have no record of any payment from the Morgan Bank at any time in or about September 1982."

(C.R. 37, pp. 108-109; C.R. 40, p. 76.)

Accordingly, Morgan filed suit against American in the District Court for the Central District of California. Morgan alleged, *inter alia*, that, given the facts as set forth above, Morgan's equitable right under New York common law to recover its mistaken payment from American was specifically preserved under the New York Uniform Commercial Code.

Proceedings & Decisions Below.

Morgan and American cross-moved for summary judgment. The district court granted American's motion and denied that of Morgan. The court determined, in essence, that a specific provision of the New York Uniform Commercial Code (section 3-418, the so-called "final payment" rule) displaced Morgan's equitable right to recovery.

On appeal, the Court of Appeals for the Ninth Circuit reversed and directed the district court to enter summary judgment in Morgan's favor. The Court determined that another section of New York Uniform Commerical Code (section 1-103) specifically preserved Morgan's equitable rights under established New York law; that there was no displacement by the New York legislature of those rights; and finally that any decision to the contrary would not be in accord with New York common law.

American petitioned for rehearing by the Court of Appeals *en banc* and the petition was denied, no judge having requested a vote thereon. (Pet. App. C.)

REASONS FOR DENYING THE WRIT

None of the criteria for granting a writ of certiorari set forth in the Rules or prior decisions of this Court is present. The only law involved is the common law and statutory law of the State of New York, as the courts below recognized and American acknowledges. No question of Federal law is involved, let alone one of sufficient magnitude calling for the intervention of this Court.[2] The

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[2]We have found only eight decisions by this Court involving any substantive discussion of specific provisions of the U.C.C. In these eight cases, this Court either resolved a conflict between the U.C.C. and federal statutory law or referenced certain U.C.C. provisions to interpret pertinent language in a federal statute. *See Federal Deposit Insurance Corp. v. Philadelphia Gear Corp.*, ____ U.S. ____, 106 S.Ct. 1931, 90 L.Ed.2d 428 (1986) (U.C.C. definition of promissory note not dispositive in interpreting "note" under Federal Deposit Insurance Act); *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 103 S.Ct. 2476, 76 L.Ed.2d 678 (1983) (Illinois U.C.C. law regarding transfer of airplanes preempted by Federal Aviation Act); *Williams v. United States*, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982) (U.C.C. definition of "check" used to interpret language in a federal criminal statute, 18 U.S.C. § 1014); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 101 S.Ct. 2266, 68 L.Ed.2d 783 (1981) (U.C.C. definition of "security" interest used to interpret same term under Truth-In-Lending Act); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979) (state U.C.C. law governed priority of liens where one of the loans was guaranteed by the Small Business Administration; summary affirmance of Circuit Court's determination of preference under Texas U.C.C. law); *Slodov v. United States*, 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed.2d 251 (1978) (U.C.C. priority rules give some creditors priority over tax liens under the Federal Tax Lien Act); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729; 56 L.Ed.2d 185 (1978) (warehouseman's proposed private sale of goods under U.C.C. § 7-210 was not "state action" for

factual pattern against which New York law must be applied was one of first impression (Pet. App. B at 21-22). The issue is not a recurring one, even under New York law. Finally, even if it were a basis for considering certiorari, there is in fact no conflict among the Courts of Appeals as to what New York law is.

The filing of this petition for certiorari has permitted American to continue to use significant monies to which Morgan is entitled under New York law. Such an incentive to delay by seeking to invoke the jurisdiction of this Court should be actively discouraged where, as here, no *bona fide* recurring issue of national law is even presented. The petition should be denied forthwith.

THE DECISION OF THE COURT OF APPEALS CORRECTLY APPLIES NEW YORK COMMON AND STATUTORY LAW TO THE UNIQUE FACTS OF THIS CASE.

As noted in the opinion of the Court of Appeals, New York common law and statutes indisputably permit recovery of money mistakenly paid when retention by the payee would be inequitable. *E.g., Paramount Films Distributing Corp. v. State,* 30 N.Y.2d 415, 421, 285 N.E.2d 695, 698, 334 N.Y.S.2d 388, 393 (1972), *cert. denied,* 414 U.S. 829 (1973); *Valley Bank of Nevada v. Bank of Commerce,* 74 Misc.2d 195, 343 N.Y.S.2d 191 (N.Y.Civ.Ct. 1973). The decision below is in full accord with the prevailing law in New York. American does not and cannot dispute that this is New York common law. Similarly, American does not dispute that under those decisions it has no equitable claim under New York law to those funds. The Court of Appeals specifically analyzed New York common law

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purposes of federal civil rights statute); *Mahon v. Stowers,* 416 U.S. 100, 94 S.Ct. 1626, 40 L.Ed.2d 79 (1974) (Texas U.C.C., rather than Packers and Stockyard Act, governs priority of creditors' claims in bankruptcy proceeding).

rights with reference to New York U.C.C. section 1-103, and concluded that the New York U.C.C. incorporates this New York common law right to restitution for mistaken payments. (Pet. App. B-13-14.)

The Court of Appeals then reviewed the text, comments and history of section 3-418 New York U.C.C., relied on by American, to determine whether it particularly displaces section 1-103's restitutionary remedy under the specific facts of this case and correctly concluded that rather than displacing section 1-103, section 3-418 was intended to codify the New York common law governing recovery of mistaken payments.[3]

American's petition contends that "[a]ll *post*-UCC judicial authority also bars restitutionary action against holders in due course." Petition, p. 11. However, all the cited cases involved fact patterns where there was never any common law right of restitution to begin with. Thus, they involved forged signatures (*Northern Trust v. Chase Manhattan Bank, N.A., 748 F.2d 803 (2d Cir 1984); Aetna Life and Casualty Co. v. Hampton State Bank,* 497 S.W.2d 80 (Tex.Ct.App. 1973)); payment over non-sufficient funds (*Lowe's of Sanford, Inc. v. Mid-South Bank and Trust Co.,* 44 N.C. App. 365, 260 S.E.2d 801 (1979); *Maplewood Bank and Trust Co. v. F.I.B., Inc.,* 142 N.J. Super. 480, 362 A.2d 44 (1976)); payment over stop payment orders (*Bryan v. Citizens National Bank in Abilene,* 628 S.W.2d 761 (Tex. 1982)); or a New York U.C.C. section (4-302) not applicable to these facts (*Bank Leumi Trust Company of New York v. Bank of Mid-Jersey,* 499 F.Supp. 1022

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[3]This analysis is detailed at Pet. App. B-15-16 where the majority reviews *Price v. Neal,* 3 Burr. 1354, 97 Eng. Rep. 871 (K.B. 1762), and its progeny, which protect payees only where a maker's signature is forged, payment is made over non-sufficient funds or stop payment orders and in other situations where, as between two innocent parties, the payor should bear the loss.

(D.N.J. 1980), *aff'd. mem.*, 659 F.2d 1065 (3d Cir. 1981) (re-presented check and failure to meet "midnight deadline")).

Similarly in error, is American's contention that no other *post* U.C.C. decision has permitted a judicial exception to the final payment rule (Petition, p. 13). In *Bank Leumi Trust Co. v. Bally's Park Place, Inc.*, 528 F. Supp. 349 (S.D.N.Y. 1981), the court clearly upheld just such an exception:

> "The commentators agree that the U.C.C. expressly preserves the common law governing mistake without alteration. . . .
>
> [The payee's] reliance on New York U.C.C. [§] 3-418 . . . is misplaced. Th[is] section [] of the U.C.C. appli[es] to interbank settlement procedures, and not to subsequent actions for restitution. A contrary reading of § 3-418 . . . would be inconsistent with § 1-103 which retains the common law governing mistake. It would lead to the unintended result of allowing a payee, unjustly to retain monies improperly obtained."[4] *Id.* at 354.

American also asserts that the decision below is in conflict with the decision of the Second Circuit in *Northern Trust v. Chase Manhattan Bank, N.A., supra.* Petition p. 12. First, even if true, that would not be the type of

[4]A footnote in the *Bank Leumi* decision states that "Concepts having to do with bona fide holders of negotiable paper in due course without notice are not involved in this litigation." 528 F. Supp. at 350 n. 1. It is clear from the fact that the payee acquired the paper as a holder in due course without notice that the point of the court's comment was that the bona fide holder status was irrelevant in the circumstances of the case. If, as suggested by American, the *Bank Leumi* decision was based on the plaintiff's lack of holder in due course status, the court would not have had to base its decision on section 1-103.

"conflict among the circuits" that would be the occasion for this Court to issue a writ of certiorari. Second, American is wrong: there is no "conflict" over New York Law.

Significantly, American fails to summarize the facts of the *Northern Trust* case. *Northern Trust* involved the payment of a forged check presented by an innocent payee. As noted by the majority below (Pet. App. B-15), this places *Northern Trust* within that aspect of section 3-418 which codified the New York common law rule prohibiting recovery by a payor bank paying over a forged signature. The *Northern Trust* case did not involve the issue present in this case, whether, as the Court below held, the New York U.C.C. likewise left in place the basic New York common law rule requiring restitution of mistaken payments where both parties know that the payee is not entitled to payment. (Notably, the *Northern Trust* court did recognize the importance of comparative equities involved even in a forged signature case by stressing the payee's entire good faith.) *Northern Trust* does not conflict with the decision below and certainly provides no basis for the grant of a writ of certiorari.

Finally, American attempts to gloss over its knowing unjust enrichment by casting itself in the role of defender of the foundation and integrity of commercial transactions which are supposedly assaulted by the decision below.

American's attempt to overstate both the meaning of this decision and its consequences was anticipated and effectively countered by the Court of Appeals:

> "American also contends that carving out 'judicial exceptions' to the final payment rule of section 3-418 will 'have a chilling effect upon the transferability and fluidity of commercial paper.' This argument

> ignores section 1-103, which mandates equitable exceptions to the Code, and fails to recognize the narrowness of our holding. The case we decide today apparently has not arisen before and we think it unlikely that it will recur often enough to undermine seriously the operation of the nation's financial markets." (Pet. App. B-21.)

This case will not affect the traditional application of New York U.C.C. section 3-418 which places responsibility on the party with superior knowledge and ability to protect itself. Nor will it affect settlements, bank deadlines or the finality of payments under New York Clearing House rules or the New York U.C.C., anymore than the decision in *Bank Leumi v. Bally's Park Place, supra* at p. 8, which held the New York final payment rule to be ineffective to bar recovery of a mistaken bank payment. In sum, American's unsupported (and to date unrealized claim) that the decision below will wreak some undefined havoc on the interbank handling of commercial paper is chimerical nonsense which ought not to delay further the conclusion of this action upon remand.

CONCLUSION

No issue is presented justifying review by this Court. The question of New York common and statutory law was correctly decided. The petition for certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 22, 1987, I served the within Opposition to Petition for Writ of Certiorari in re: "Morgan Guaranty Trust Company of New York vs. American Savings and Loan Association" in the United States Supreme Court, October Term, 1986 No. .....;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties Required To Be Served Have Been Served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 22, 1987, at Los Angeles, California

Ce Ce Medina

Ce Ce Medina